ORIGINAL

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
Digital Performance Right in Sound Recordings Rate Adjustment	)	Docket No. 2001-1 CARP DSTRA 2

COMMENTS OF ROYALTY LOGIC, INC. OBJECTING TO PROPOSED TERMS

Pursuant to the Notice of Proposed Rulemaking in the above-captioned proceeding, published at 68 Fed. Reg. 4744 (January 30, 2003), Royalty Logic, Inc. ("RLI") files hereby its objections to those terms of the proposed regulations that relate to the Designated Agent. RLI raises no objection to the rates agreed to by the parties. Specifically, RLI objects to proposed regulations for § 260.3(d)-(f). RLI's alternative proposed regulations are submitted herewith at Appendix A. Also submitted herewith is a Notice of Intent to Participate in any arbitration in this proceeding with respect to designation of, and the terms and regulations applicable to, the Receiving Agent and Designated Agents.

Background of RLI and its Interest in This Proceeding

RLI is a for-profit corporation with its principal place of business in Burbank, California. RLI is affiliated with Music Reports, Inc. Since 1989, Music Reports, Inc. has provided the precise types of services to be performed under the Section 114 license with respect to the public performances of musical works on radio, television, cable and satellite broadcasting, and cable and satellite subscription music services. MRI currently administers more than $50 million in music licensing royalties annually, on behalf of hundreds of radio and television stations. Among MRI's client base are most of the major television group

owners, including NBC, ABC, CBS, Hearst Broadcasting, Gannett Broadcasting, and Cox Broadcasting; cable programming services such as USA Network, QVC and Home Shopping Network; subscription music services such as Muzak; and websites and others who need to use music in connection with their products or services.

MRI owns an extensive and up-to-date electronic database, known as "SONGDEX," containing business and ownership information with respect to millions of musical works and sound recordings. MRI created and implemented sophisticated electronic data processing and file transfer systems to compute and process reports regarding millions of uses of these copyrighted works. As financial trustee for its clients, MRI handles license fee payment and royalty accounting services, with a verifiable audit trail. MRI performs these services under requirements of strict confidentiality, and does not disclose to any party confidential business information concerning uses of musical works or sound recordings licensed by other parties.

Among RLI's key business objectives is to provide these same types of agency services to recording labels and performing artists with respect to the administration and distribution of royalty payments to be made to them pursuant to the statutory licenses under Sections 112(e) and 114 of the Copyright Act. RLI was appointed by the Librarian of Congress as one of two Designated Agents for the distribution of royalties paid under the Section 114 statutory license for the digital transmission of sound recordings by Eligible Nonsubscription Services. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45239 (July 8, 2002) (the "Webcaster Decision"); 37 C.F.R. §261.4(b).

On January 17, 2003, RLI filed with the Copyright Office a Notice of Intent to Participate, and a Motion to Accept Late Filing, in the above-captioned arbitration

proceeding, solely with respect to the designation of, and the terms of the statutory license applicable to, Receiving Agents and Designated Agents. As set forth in RLI's Motion, RLI desires through its Motion and Notice to become a Designated Agent so as to provide agency services for the statutory performance royalties to be paid by pre-existing subscription services. That motion remains pending before the Copyright Office.

RLI believes that designation of RLI as an agent with respect to the distribution of statutory sound recording performance license royalties in this proceeding would:

- **create efficiencies for the copyright owners and performers** entitled to receive such royalty payments, inasmuch as it would be more efficient for these recipients to receive payments from and provide information to a single agent for all licenses;
- **reduce administrative costs to these copyright owners and performers,** inasmuch as all payments would be handled in communications from a single organization;
- **enhance efficiencies for the Receiving Agent**, which would know that payments to specific copyright owners and performers are administered by the same agent under each of the statutory licenses; and,
- **support the efficient operation and expansion of RLI as a competitor** to SoundExchange.

Since its appointment as a Designated Agent in the Webcaster Decision, RLI has negotiated with numerous representatives of recording labels and artists, who have indicated strong interest in being represented by RLI. However, RLI's efforts to enroll clients have been substantially impeded by its inability to assure clients of RLI's ability to administer all license payments to which these clients would be entitled. Many of these parties have

expressed to RLI that they prefer to sign with RLI, but that they would not want to do so unless RLI administers the sound recording performance right payments under all statutory licenses.

They give two primary reasons for this. One reason has to do with the efficiencies that would be obtained by using a single administrator and, conversely, the burdens that would be imposed upon clients to deal with multiple agents. For example, it is extremely burdensome and expensive for these clients to send information on future, current and catalog sound recordings and performances to multiple agents; send payment information to multiple agents; provide tax information to multiple agents; monitor the timing and accuracy of payments received from multiple agents; and to perform audits upon multiple agents. The second reason is a concern, expressed by several representatives of prominent artists who have discussed using RLI as an agent, that unless RLI is appointed as a Designated Agent for all licenses, these artists may encounter difficulties (based, for example, upon disputed interpretations of statutory or regulatory provisions or of contractual agreements) in obtaining other royalties separately from SoundExchange. These artists and their representatives are well aware of the direct payment to artists provisions in the Small Webcaster Amendments Act of 2002; but they express deep concern that the law will somehow fall prey to a "loophole," and that their statutory license payments may be withheld unless payments are made to a totally independent and autonomous agent.

In short, these parties have told RLI that they believe that it is necessary to have the ease and certainty of a choice of agents for all statutory licenses, rather than to incur the potential risks and expenses in dealing with multiple agents.

RLI Is an "Interested Party" in This Proceeding.

In prior proceedings, the Copyright Office defined what it means to be an "interested party" for purposes of participating in a CARP proceeding. Having an interest in a CARP proceeding "suggests that a participant must be a party directly affected by the royalty fee, e.g., as a copyright owner, a copyright user, or an entity or organization involved in the collection and distribution of royalties." Order, *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Dkt. No. 99-6 CARP DTRA (June 21, 2000). As an entity that distributes royalties, RLI has a stake in the proceeding and is properly an interested party.

That RLI's interest is proper in this proceeding further is demonstrated by the current regulations applicable to pre-existing subscription services. Current regulations provide that payments are to be made to the "designated agent(s)" and that the identity of such agents is "to be determined by the parties through voluntary license agreements or by a duly appointed Copyright Arbitration Royalty Panel pursuant to the procedures set forth in subchapter B of 37 CFR, part 251." 27 C.F.R. § 260.3(a).[1] Thus, Section 260.3(a) establishes two important points. First, the regulations explicitly contemplate the designation of multiple agents.

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[1] *See also* 37 C.F.R. § 261.2: "*Designated Agent* is the agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part from the Receiving Agent." The parties to that arbitration proceeding similarly had proposed the following definition: "A 'Designated Agent' is an agent designated by the Librarian of Congress *through the same rate setting process* who receives royalty fees paid for use of the statutory licenses from the Receiving Agent and makes further distributions of these fees to Copyright Owners and Performers." *See* Webcaster Decision, 67 Fed. Reg at 45267 n. 45 (emphasis added). Thus even those parties who previously in this proceeding have contended, fallaciously, that RLI is not an "interested party" in this CARP proceeding, suggest that a Designated Agent can be designated through the statutory rate-setting process.

Second, the identity of the agents can be determined by a duly appointed Copyright Arbitration Royalty Panel.

Thus, in light of the prior decisions of the Copyright Office, and the provisions of Section 260.3, RLI meets the definition of an "interested party" for purposes of this proceeding.

Use of Multiple Agents has Proven Beneficial and Desirable in Other Compulsory and Music Licensing Contexts.

Provisions of existing statutory licenses applicable to music copyrights (*e.g.*, §§ 112(e)(2), 114(e)(1-2), 115(c)(3)(B) and 116(b)(2)) are consistent in providing that copyright owners "...may designate common agents to negotiate, agree to, pay or receive royalty payments." These provisions do not impose any restrictions on either the right of copyright owners to choose a common agent, or the ability of any entity to function as a common agent.

Multiple common agents function in the administration of the section 115 statutory license (*e.g.,* Harry Fox Agency, MCS Music America, Inc., Bug Music, Wixon Music Publishing, Inc., Mizmo Enterprises, etc.) without any Copyright Office regulation or oversight as to who may function in that capacity, when such common agents may commence operation or how they operate. Other copyright owners administer these rights themselves or through their lawyers.

In the context of the performance of musical works, there are three well-established agents representing songwriters and music publishers, ASCAP, BMI and SESAC. At one time BMI represented only a few gospel and country writers and publishers. Now, BMI represents approximately the same market share as ASCAP, and the rolls of SESAC continue to grow as well.

RLI respectfully submits that such related experience in the music industry suggests that copyright owners and performers also will desire, and benefit from, having a competitive choice among agents for the distribution of sound recording performance royalties. Multiple agents will compete for clients based upon the benefits each offers to its respective members. Such benefits may take the form of lower administration costs, more flexible terms, more frequent payments, greater transparency in operation, better access to information, and other terms that confer potential benefits upon the membership. Thus, giving a choice to copyright owners and performers will stimulate each agent to offer better service and better terms, and thereby promote the purposes and the benefits of the statutory license.

RLI's Designation Will Deliver to its Client Copyright Owners and Performers the Benefits Congress Intended to Confer Upon Them through the SWAA.

When enacting the Small Webcaster Amendments Act of 2002 ("SWAA"), Congress permitted the Receiving Agent to deduct particular costs from royalties to be distributed under the statutory license, with specified exceptions that are directly relevant here. New Section 114(g)(3) provides:

> A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from another designated agent and have notified such nonprofit agent in writing of such election**, the reasonable costs of such agent incurred after November 1, 1995, in-
>
> (A) the administration of the collection, distribution, and calculation of the royalties;
>
> (B) the settlement of disputes relating to the collection and calculation of the royalties; and
>
> (C) the licensing and enforcement of rights with respect to the making of ephemeral recordings and performances subject to licensing under section 112 and this section, including those incurred in participating

in negotiations or arbitration proceedings under section 112 and this section, except that all costs incurred relating to the section 112 ephemeral recordings right may only be deducted from the royalties received pursuant to section 112.

(Emphasis added).

This section reflected two important policies relevant to this proceeding. First, Congress acknowledged and contemplated that more than one entity could serve as a Designated Agent in competition with SoundExchange. Thus, Congress acknowledged implicitly the logic of the existing structure that created competition among agents that administer the royalties. Second, while Congress acceded to SoundExchange's request to deduct CARP and other costs from the royalties payable to SoundExchange members, Congress specifically prohibited SoundExchange from deducting royalties payable to clients of competing agents. Thus, Congress codified and extended the meaningfulness of the choice between competing agents, by providing that performers and copyright owners have the absolute right to choose a Designated Agent other than SoundExchange so as to avoid the recoupment of historical litigation and other costs.[2] Notably, this subsection of the SWAA applies to all services covered under the section 114 statutory license, even though the statute was adopted primarily to alleviate specific royalty and regulatory burdens imposed under section 114 and the Webcaster Decision upon small webcasters.

RLI respectfully submits that it would be extraordinary and inappropriate for private parties to thus thwart the will of Congress by eliminating, by private agreement, the sole

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[2] Given this explicit Congressional intent, it is specious as well as unfair for RIAA to characterize non-SoundExchange copyright owners and performers, and RLI, as "free riders" -- particularly inasmuch as they had little or no meaningful opportunity to influence those in the driver's seat. RIAA made this argument to Congress prior to passage of the SWAA. Congress already considered the argument, and rejected it. RIAA and SoundExchange should not now be permitted to obtain through the back door what Congress determined not to give them at all.

competitor to SoundExchange that Congress assured would not be saddled with expenses that neither it nor its clients incurred. Indeed, section 114(g)(3), and in particular the language highlighted above in bold, was amended by Congress following introduction of the bill, specifically to protect the interests of non-SoundExchange-member copyright owners and performers. If the Joint Petitioners succeed in denying RLI's clients their right to receive unencumbered royalties from this proceeding, then what would prevent these parties from repeatedly engaging in the same tactics, and reaching private agreements in settlement of other pending arbitrations, that similarly prevent RLI clients from obtaining their payments through their agent of choice?

If the interests of these copyright owners and performers are to be protected and served, as Congress intended, then they deserve as an alternative to SoundExchange a financially-sound competitor that can administer royalty payments. RLI is ready to be that competitor. However, RLI's operations, expansion and financial stability will be seriously impeded if its agency capabilities are limited to distributions of royalties only from past arbitrations. As noted above, RLI's potential clients have stated their strong desire that RLI administer all statutory performance licenses. Providing administrative services under all such licenses will bring greater financial stability to RLI, maximize efficiencies and lower administrative costs, all to the benefit of RLI and its clients.

Conclusion

For the reasons set forth above, RLI respectfully objects to the proposed regulations. For the convenience of the parties, and in the hope that constructive dialogue among the parties may yet avoid a CARP proceeding, RLI attaches hereto as Appendix A proposed alternative regulations that would provide for the use of multiple Designated Agents.

Pursuant to the Notice of Proposed Rulemaking, and out of an abundance of caution, RLI submits herewith a Notice of Intent to Participate in any arbitration in this proceeding.

Respectfully submitted,

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Appendix A
RLI Proposed Modifications to Proposed Regulations

PART 260-- RATES AND TERMS FOR PREEXISTING SUBSCRIPTION SERVICES' DIGITAL TRANSMISSIONS OF SOUND RECORDINGS AND THE MAKING OF EPHEMERAL PHONORECORDS

Sec.

§ 260.1 -- General.

(a) This part 260 establishes rates and terms of royalty payments for the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 114(d)(2), and the making of ephemeral phonorecords in connection with the public performance of sound recordings by nonexempt preexisting subscription services in accordance with the provisions of 17 U.S.C. 112(e).

(b) Upon compliance with 17 U.S.C. 114 and the terms and rates of this part, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 114(d)(2).

(c) Upon compliance with 17 U.S.C. 112(e) and the terms and rates of this part, nonexempt preexisting subscription services may engage in the activities set forth in 17 U.S.C. 112(e) without limit to the number of ephemeral phonorecords made.

(d) For purposes of this part, *Licensee* means any preexisting subscription service as defined in 17 U.S.C. 114(j)(11).

(e) For purposes of this part, *Designated Agent* is an agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part from

the Receiving Agent. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers that have been identified in §260.3(c).

(f) For purposes of this part, *Performer* means the respective independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(g) For purposes of this part, *Receiving Agent* is the agent designated by the Librarian of Congress for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to Designated Agents, and that has been identified as such in § 260.3(b). The Receiving Agent may also be a Designated Agent.

§ 260.2 -- Royalty fees for the digital performance of sound recordings and the making of ephemeral phonorecords by preexisting subscription services.

(a) *Royalty Fee for 2002 – 2003.* Commencing January 1, 2002 and continuing through December 31, 2003, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.0% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(b) *Royalty Fee Commencing 2004 – 2007.* Commencing January 1, 2004 and continuing through December 31, 2007, a Licensee's monthly royalty fee for the public performance of sound recordings pursuant to 17 U.S.C. 114(d)(2) and the making of any number of ephemeral phonorecords to facilitate such performances pursuant to 17 U.S.C. 112(e) shall be 7.25% of such Licensee's monthly gross revenues resulting from residential services in the United States.

(c) *Annual Advance Payment.* Commencing in the year 2003 and continuing through the year 2007, each Licensee making digital performances of sound recordings pursuant to 17 U.S.C. 114(d)(2) and ephemeral phonorecords pursuant to 17 U.S.C. 112(e) shall make an advance payment of $100,000 per year, payable no later than January 20th of each year; Provided, however, that for 2003, the annual advance payment shall be due on [*Copyright Office – insert the 20th day following the month in which these rates and terms are published in the Federal Register as a final rule]*. The annual advance payment shall be nonrefundable, but the royalties due and payable for a given year or any month therein under paragraphs (a) and (b) of this Section 260.2 shall be recoupable against the annual advance payment for such year; Provided, however, that any unused annual advance payment for a given year shall not carryover into a subsequent year.

(d) A Licensee shall pay a late fee of 1.5% per month, or the highest lawful rate, whichever is lower, for any payment received after the due date. Late fees shall accrue from the due date until payment is received.

(e) (1) For purposes of this section, *gross revenues* shall mean all monies derived from the operation of the programming service of the Licensee and shall be comprised of the following:

(i) Monies received by Licensee from Licensee's carriers and directly from residential U.S. subscribers for Licensee's programming service;

(ii) Licensee's advertising revenues (as billed), or other monies received from sponsors if any, less advertising agency commissions not to exceed 15% of those fees incurred to a recognized advertising agency not owned or controlled by Licensee;

(iii) Monies received for the provision of time on the programming service to any third party;

(iv) Monies received from the sale of time to providers of paid programming such as infomercials;

(v) Where merchandise, service, or anything of value is received by Licensee in lieu of cash consideration for the use of Licensee's programming service, the fair market value thereof or Licensee's prevailing published rate, whichever is less;

(vi) Monies or other consideration received by Licensee from Licensee's carriers, but not including monies received by Licensee's carriers from others and not accounted for by Licensee's carriers to Licensee, for the provision of hardware by anyone and used in connection with the programming service;

(vii) Monies or other consideration received for any references to or inclusion of any product or service on the programming service; and

(viii) Bad debts recovered regarding paragraphs (e)(1)(i) through (vii) of this section.

(2) Gross revenues shall include such payments as are in paragraphs (e)(1)(i) through (viii) of this section to which Licensee is entitled but which are paid to a parent, subsidiary, division, or affiliate of Licensee, in lieu of payment to Licensee, but not including payments to Licensee's carriers for the programming service. Licensee shall be allowed a deduction from "gross revenues" as defined in paragraph (e)(1) of this section for affiliate revenue returned during the reporting period and for bad debts actually written off during the reporting period.

(f) During any given payment period, the value of each performance of each digital sound recording shall be the same.

§ 260.3 -- Terms for making payment of royalty fees.

~~(a) All royalty payments shall be made to a designated agent(s), to be determined by the parties through voluntary license agreements or by a duly appointed Copyright Arbitration Royalty Panel pursuant to the procedures set forth in subchapter B of 37 CFR, part 251.~~

~~(b) Payment shall be made on the forty-fifth day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set.~~

~~(c) The agent designated to receive the royalty payments and the statements of account shall have the responsibility of making further distribution of these fees to those parties entitled to receive such payment according to the provisions set forth at 17 U.S.C. 114(g).~~

~~(d) The designated agent may deduct from any of its receipts paid by Licensees under 260.2, prior to the distribution of such receipts to any person or entity entitled thereto, the reasonable costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that the parties entitled to receive royalty payments according to the provisions set forth at 17 U.S.C. 114(g)(1) & (2) who have authorized a designated agent may agree to deduct such other costs agreed to by such other parties and the designated agent.~~

~~(e) Until such time as a new designation is made, SoundExchange, which initially is an unincorporated division of the Recording Industry Association of America, Inc., shall be the agent receiving royalty payments and statements of account and shall continue to be designated if it should be separately incorporated.~~

~~(f) A Licensee shall make any payments due under § 260.2(a) for digital transmissions or ephemeral phonorecords made between January 1, 2002, and [*Copyright Office – insert the last day of the month in which these rates and terms are published in the Federal Register as a final rule*] 2003, to the Designated Agent, less any amounts previously paid for such period to the Recording Industry Association of America, Inc. [SoundExchange?]by or SoundExchange by [*Copyright Office – enter the 45th day following the month in which these rates and terms are published in the Federal Register as a final rule*].~~

(a) A Licensee shall make the royalty payments due under §260.2 to the Receiving Agent on the forty-fifth day after the end of each month for that month, commencing with the month succeeding the month in which the royalty fees are set. If there are more than one Designated Agent representing Copyright Owners or Performers entitled to receive any portion of the royalties paid by the Licensee, the Receiving Agent shall apportion the royalty payments among Designated Agents using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such apportionment shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Receiving Agent and the

Designated Agents. Within 30 days of adoption of a methodology for apportioning royalties among Designated Agents, the Receiving Agent shall provide the Register of Copyrights with a detailed description of that methodology.

(b) Until such time as a new designation is made, SoundExchange, which initially is an unincorporated division of the Recording Industry Association of America, Inc., is designated as the Receiving Agent to receive statements of account and royalty payments from Licensees and shall continue to be designated if it should be separately incorporated. Until such time as a new designation is made, Royalty Logic, Inc. and SoundExchange are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners.

(c) SoundExchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2) from the performance of sound recordings owned by such Copyright Owners, except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from a particular Designated Agent. With respect to any royalty payment received by the Receiving Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the receipt by the Receiving Agent of that royalty payment.

(d) A Licensee shall make any payments due under § 260.2(a) for digital transmissions or ephemeral phonorecords made between January 1, 2002, and [*Copyright Office - insert the last day of the month in which these rates and terms are published in the Federal Register as a final rule*] 2003, to the Receiving Agent, less any amounts previously paid for such period to the Recording Industry Association of America, Inc. or SoundExchange by [*Copyright Office – enter the 45th day following the month in which these rates and terms are published in the Federal Register as a final rule*].

(e) The Receiving Agent shall make payments of the allocable share of any royalty payment received from any Licensee under this section to the Designated Agent(s) as expeditiously as is reasonably possible following receipt of the Licensee's royalty payment and statement of account as well as the Licensee's Report of Use of Sound Recordings under Statutory License for the period to which the royalty payment and statement of account pertain, with such allocation to be made on the basis determined as set forth in paragraph (a) of this section. The Receiving Agent and the Designated Agent shall agree on a reasonable basis on the sharing on a pro-rata basis of any incremental costs directly associated with the allocation method. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the Receiving Agent and a Designated Agent for each calendar year no later than 180 days following the end of each calendar year.

(f) The Designated Agent shall distribute royalty payments on a reasonable basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of performances; *Provided*, however, that Copyright Owners and Performers who have designated a

particular Designated Agent may agree to allocate their shares of the royalty payments among themselves on an alternative basis.

(g)(1) A Designated Agent shall provide to the Register of Copyrights:

(i) A detailed description of its methodology for distributing royalty payments to Copyright Owners and Performers who have not agreed to an alternative basis for allocating their share of royalty payments (hereinafter, "non-members"), and any amendments thereto, within 30 days of adoption and no later than 60 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(ii) Any written complaint that the Designated Agent receives from a non-member concerning the distribution of royalty payments, within 30 days of receiving such written complaint; and

(iii) The final disposition by the Designated Agent of any complaint specified by paragraph (i)(1)(ii) of this section, within 60 days of such disposition.

(2) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Agent's methodology for distributing royalty payments to non-members meets the requirements of this section.

(h) A Designated Agent shall distribute such royalty payments directly to the Copyright Owners and Performers, according to the percentages set forth in 17 U.S.C. 114(g)(2), if such Copyright Owners and Performers provide the Designated Agent with adequate information necessary to identify the correct recipient for such payments. However, Performers and Copyright Owners may jointly agree with a Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties to Performers and Copyright Owners consistent with the percentages in 17 U.S.C. 114(g)(2).

(i) A Designated Agent may deduct from the royalties paid to Copyright Owners and Performers reasonable costs incurred in the collection and distribution of the royalties paid by Licensees under §260.2, and a reasonable charge for administration.

(j) In the event a Designated Agent and a Receiving Agent cannot agree upon a methodology for apportioning royalties pursuant to paragraph (a) of this section, either the Receiving Agent or a Designated Agent may seek the assistance of the Copyright Office in resolving the dispute.

§ 260.4 -- Confidential information, ~~and~~ statements of account and records of use of Sound Recordings.

(a) For purposes of this part, confidential information shall include statements of account and any information pertaining to the statements of account designated as confidential by the nonexempt preexisting subscription service filing the statement.

Confidential information shall also include any information so designated in a confidentiality agreement which has been duly executed between a nonexempt preexisting subscription service and an interested party, or between one or more interested parties; Provided that all such information shall be made available, for the verification proceedings provided for in §§ 260.5 and 260.6 of this part.

(b) Nonexempt preexisting subscription services ~~shall submit monthly statements of account on a form provided by the agent designated to collect such forms and the monthly royalty payments.~~shall submit a monthly statement of account for accompanying royalty payments on a form prepared by the Receiving Agent after full consultation with all Designated Agents. The form shall be made available to the Licensee by the Receiving Agent. Concurrently with the delivery of any payment to the Receiving Agent, a Licensee shall deliver to each Designated Agent a copy of the statement of account for such payment. A Licensee shall also supply to each Designated Agent Licensee's Report of Use of Sound Recordings under Statutory License in accordance with the information required to be provided pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made.

(c) A statement of account shall include only such information as is necessary to verify the accompanying royalty payment. Additional information beyond that which is sufficient to verify the calculation of the royalty fees shall not be included on the statement of account.

(d) Access to the confidential information pertaining to the royalty payments shall be limited to:

(1) Those employees, agents, consultants and independent contractors of the designated agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities directly related thereto, who are not also employees or officers of a sound recording copyright owner or performing artist, and who, for the purpose of performing such duties during the ordinary course of employment, require access to the records; and

(2) An independent and qualified auditor who is not an employee or officer of a sound recording copyright owner or performing artist, but is authorized to act on behalf of the interested copyright owners with respect to the verification of the royalty payments.

(e) The designated agent or any person identified in paragraph (d) shall implement procedures to safeguard all confidential financial and business information, including, but not limited to, royalty payments, submitted as part of the statements of account, using a reasonable standard of care, but no less than the same degree of security used to protect confidential financial and business information or similarly sensitive information belonging to the designated agent or such person.

(f) Books and records relating to the payment of the license fees shall be kept in accordance with generally accepted accounting principles for a period of three years. These records shall include, but are not limited to, the statements of account, records documenting an interested party's share of the royalty fees, and the records pertaining to the administration of the collection process and the further distribution of the royalty fees to those interested parties entitled to receive such fees.

§ 260.5 -- Verification of statements of account.

(a) *General.* This section prescribes general rules pertaining to the verification of the statements of account by interested parties according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C. 114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).

(b) *Frequency of verification.* Interested parties may conduct a single audit of a nonexempt preexisting subscription service during any given calendar year.

(c) *Notice of intent to audit.* Interested parties must submit a notice of intent to audit a particular service with the Copyright Office, which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the interested parties' notice. Such notification of intent to audit shall also be served at the same time on the party to be audited.

(d) *Retention of records.* The party requesting the verification procedure shall retain the report of the verification for a period of three years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all parties.

(f) *Costs of the verification procedure.* The interested parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the service which made the underpayment shall bear the costs of the verification procedure.

(g) *Interested parties.* For purposes of this section, interested parties are those copyright owners who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), their ~~d~~Designated ~~a~~Agents, or the entities~~y~~ designated ~~by the copyright arbitration royalty panel~~ in 37 CFR 260.3 to receive and to distribute the royalty fees.

§ 260.6 -- Verification of royalty payments.

(a) *General.* ~~This section prescribes general rules pertaining to the verification of the payment of royalty fees to those parties entitled to receive such fees, according to terms promulgated by a duly appointed copyright arbitration royalty panel, under its authority to set reasonable terms and rates pursuant to 17 U.S.C. 114 and 801(b)(1), and the Librarian of Congress under his authority pursuant to 17 U.S.C. 802(f).~~ This section prescribes general rules pertaining to the verification by any Copyright Owner or Performer of royalty payments made by a Designated Agent; *Provided,* however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and a Designated Agent have agreed as to proper verification methods.

(b) *Frequency of verification.* ~~Interested parties~~ A Copyright Owner or Performer may conduct a single audit of a Designated Agent~~the entity making the royalty payment~~ during any given calendar year.

(c) *Notice of intent to audit.* ~~Interested parties~~ A Copyright Owner or Performer must submit a notice of intent to audit ~~the entity making the royalty payment~~ a particulart Designated Agent with the Copyright Office, which shall publish in the Federal Register a notice announcing the receipt of the notice of intent to audit within 30 days of the filing of the ~~interested parties'~~ notice. ~~Such notification of interest shall also be served at the same time on the party to be audited.~~ The notification of intent to audit shall be served at the same time on the Designated Agent to be audited.

(d) *Retention of records.* The party requesting the verification procedure shall retain the report of the verification for a period of three years.

(e) *Acceptable verification procedure.* An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent auditor, shall serve as an acceptable verification procedure for all parties.

(f) *Costs of the verification procedure.* The ~~interested~~ parties requesting the verification procedure shall pay for the cost of the verification procedure, unless an independent auditor concludes that there was an underpayment of five (5) percent or more; in which case, the entity which made the underpayment shall bear the costs of the verification procedure.

~~(g) *Interested parties.* For purposes of this section, interested parties are those who are entitled to receive royalty fees pursuant to 17 U.S.C. 114(g), or their designated agents.~~

§ 260.7 -- ~~Unknown copyright owners~~Unclaimed Funds.

If the designated collecting agent is unable to identify or locate a copyright owner or Performer who is entitled to receive a royalty payment under this part, the collecting agent shall retain the required payment in a segregated trust account for a period of three

years from the date of payment. No claim to such payment shall be valid after the expiration of the three-year period. ~~After the expiration of this period, the collecting agent may use the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3).~~ After the expiration of this period, the unclaimed funds of the Designated Agent may first be applied to the costs directly attributable to the administration of the royalty payments due such unidentified Copyright Owners and Performers and shall thereafter be allocated on a pro rata basis among the Designated Agents(s) to be used to offset such Designated Agent(s) other costs of collection and distribution of the royalty fees.